Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27012
THIRD DIVISION Docket No. MW-26579
88-3-85-3-321

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when outside forces were used to cut brush on the Carrier's right-of-way between West Allens and East Allens, Pennsylvania on January 26 and 27, 1984 (System Docket CR-889).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) Because of the aforesaid violations, Mr. S. L. Ransdorf shall be allowed sixteen (16) hours of pay at this straight time rate."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

As Third Party in Interest, the Brotherhood of Railroad Signalmen was advised of the pendency of this dispute but chose not to file a submission with the Division.

The Carrier contracted with an outside firm to cut brush and trim trees along the pole line of the right-of-way between West Allens and East Allens, Pennsylvania. No notice of the intent to have this work performed by outside forces was given to the Organization's General Chairman.

Relevant portions of the Scope Rule read as follows:

"In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

There is no question that, under these provisions, the Carrier is required to notify the General Chairman when it "plans to contract out work within the scope" of the applicable Agreement. The Carrier argues, however, that the proposed work (brush cutting) is not within the scope of the Agreement and thus no notification is required. The Carrier contends that there is no showing that the Organization has exclusive rights to such work, either through specific Agreement language or otherwise, and that there is at least some question as to whether the work may be more appropriately within the work assigned to employees represented by a different Organization.

The Organization demonstrates, however, that such work had been assigned to employees it represents and that seniority rules as well as proposed job assignments make specific reference to such work and the equipment required therefor.

The Board finds that the Carrier's insistence on an exclusivity test is not well founded. Such may be the critical point in other disputes, such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obliged to make notification where work to be contracted out is "within the scope" of the Organization's Agreement. There is no serious contention that brush cutting work is not properly performed by Maintenance of Way employes, even if not at all locations or to the exclusion of other employees. As emphasized by the Organization, the Carrier failed to make any notification to any Organization.

The Scope Rule quoted above recognizes the right of the Carrier to contract out work, but at the same time it places the Carrier under the special obligation of pre-notification and, if requested, discussion and an "attempt to reach an understanding" with the Organization. Whether or not the work here involved would have eventually been contracted out, assigned to another craft or class, or assigned to Maintenance of Way employees is not the principal point and indeed need not be resolved here. What the Board does find, however, is a failure by the Carrier to initiate the notification procedure.

The Claimant herein is an employee on furlough contending his availability to perform the work. The Carrier argues that payment of the claim is inappropriate, even if violation is found of the provisions of the Scope Rule. The Board does not agree. What would have been the outcome had the Carrier complied with the notification procedure cannot be predicted or retroactively determined by the Board. One consequence, however, is that discussion and attempts at reaching an understanding may have resulted in assignment of work to a Maintenance of Way employee. On this basis, the Board finds the remedy sought in the claim to be proper.

Thus, the Board will sustain the claim as stated in Paragraphs (2) and (3) of the claim. With this, it is unnecessary to rule on the contention in Paragraph (1) of the claim.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD NOS. 27012, 27014; DOCKET NOS. MW-26579, MW-26642
(Referee Marx)

The Majority has committed two grievous errors in the handling of these cases.

First, they have completely overlooked or failed to give any credence to the decision rendered by the Third Division in Award 26676 which involved the same parties, the same agreement and the same dispute, i.e., brush cutting under a signal system. In Award 26676, the Majority correctly denied the Organization's claim, stating:

> "The Organization has produced no evidence appearing in the record of this dispute which supports its contentions that the work in question is the type of work reserved to Maintenance of Way Employes, either by practice or agreement language."

In Awards 27012 and 27014, while recognizing that the dispute involved pole line brush cutting and inviting the Brotherhood of Railroad Signalmen as a Third Party, the Majority nevertheless somehow decided that the agreement was violated when the Organization was not given advance notice of the contracting although not finding a violation of the agreement because a contractor was used. An extension of this convoluted decision would require an advance notice to the Organization even when Signalmen are used to cut brush under pole lines, an item of work clearly spelled out in that Agreement.

Certainly, the proper and logical path to follow was that already set by Award 26676. Having gone astray, the Majority has merely muddied the waters by these awards.

Secondly, and more importantly, the Majority has decided a notice is required even if the work involved is not within the scope of the Agreement simply because the represented employees have participated in brush cutting in the past. However, the decision ignores the fact that brush cutting is not mentioned in the Scope Rule. The Majority further overlooks the fact that brush cutting has been performed historically by other crafts and by contractors, throughout the property without prior notice and without any protest.

For these reasons, it is necessary that we dissent.

Robert L Hicks
R. L. HICKS

M. W. PINGERHUT

Michael C. Lesnik
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James E. Yost
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